

EXHIBIT H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: :
IN RE NEW YORK CITY POLICING : Docket #20cv8924
DURING SUMMER 2020 DEMONSTRATIONS :
: New York, New York
February 13, 2023
----- : TELEPHONE CONFERENCE

PROCEEDINGS BEFORE
THE HONORABLE GABRIEL W. GORENSTEIN,
UNITED STATES MAGISTRATE JUDGE

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None

E X H I B I T S

<u>Exhibit Number</u>	<u>Description</u>	<u>ID</u>	<u>In</u>	<u>Voir Dire</u>
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None

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Scutero, I mean this is a report about a particular individual, a person of interest. I mean all kinds of personal information about this person, and I mean it's just quite obviously a matter that would undermine the privacy of individuals involved in an investigation.

MR. SCUTERO: Yes, we agree --

THE COURT: Gang affiliation and all kinds of stuff. So I'm holding this one too. There's certainly no need by the plaintiffs, and a protective order is not going to solve it.

Okay, I think there's only, in the next group, which are the OTM documents, are any of those law enforcement privilege? I'm trying to look at my listing here. 6042258 or 323. Yes, 56, 51616, that's the only one of that group. Do you see the one I'm talking about? I'll give the full number. It's DNNL00303_000151616.

MR. SCUTERO: Yes, Judge, I'm pulling it up now. Judge, I think this falls under the same category as the other briefing documents that you had already ruled or upheld the privilege under.

THE COURT: Well, this seems like of a different character because what it is is it seems to be sort of a summary of how the intelligence bureau

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operates. I'm not saying it's not protected or is protected. It's not like the daily terrorism briefing. I'm not sure what you were likening this to.

MR. SCUTERO: Right, but at the - that is true, Judge, that it does provide information as to how the intelligence bureau operates and as such should be protected. But if you scroll down to the end of the document in the appendix, it also provides, you know, information about terrorist plots that are targeting New York City and emanating from New York City.

THE COURT: Yes, okay, and that is easily protected, but I think you need to talk to me about whether the first, I mean protected for the same reasons I said earlier about the daily terrorism briefing of the same character. But what about the first pages about the structure and the different units that operate within and how they operate, just address that please.

MR. SCUTERO: Sure, Judge, well, again, this is information that pertains to techniques and procedures that the NYPD uses to collect and assess intelligence with respect to potential crimes. Because of that it meets that first prong under the law enforcement privilege and should be protected.

I don't - the plaintiffs haven't provided a

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compelling need for this information. They argue that they should be entitled to intelligence relating to the protests because their argument is that the defendants have posited a defense that there was no intelligence with regards to the protests and the NYPD relied upon. But the information --

THE COURT: Wait, wait, wait. Say that again. You said they posited a defense? I didn't follow that. Try me again.

MR. SCUTERO: Yeah, so they, the plaintiffs in their papers argue that the defendants have put forth a defense that with respect to intelligence collection, and if I can just - with respect to intelligence collection that the defendants relied upon intelligence in conducting their policing of the protests. The document that we are currently looking at doesn't have any information or at least doesn't appear to have information with respect to - and I'm sorry, the document, I just lost the document - doesn't appear to have information relating to policing the protests at issue here.

THE COURT: Well, I mean that's the substantial need issue is what you're saying.

MR. SCUTERO: Yes, they --

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THE COURT: All right - go ahead.

MR. SCUTERO: No, I was just arguing that they don't have a substantial need. We meet the first prong under the law enforcement privilege because this information pertains to techniques and procedures. They now have to rebut that under the strong presumption that privilege doesn't apply based on a compelling need. Our argument is that they do not have a compelling need for this information because it doesn't contain information with respect to the protests.

THE COURT: Okay, Mr. Lambright.

MR. LAMBRIGHT: So, again, it's hard to (indiscernible) not seeing what is actually there. But, you know, I think maybe it's helpful to kind of just talk about the importance of intelligence and the kind of this litigation. You know, the defendants have constantly asserted that they intelligence that there are certain threats and that intelligence informed how they responded to the protests. Obviously, we have (indiscernible) challenging that the City's response to the protests.

And additionally I'll note that in the DOI report, one of the major concerns and kind of problems that were pointed out about the NYPD's response to the

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2 protest was faulty intelligence. And, you know, insofar
3 as, you know, insofar as the document can speak to how
4 the NYPD collected intelligence and how they collect
5 intelligence and how, you know, they got faulty
6 intelligence I think is particularly relevant, and even
7 if the law enforcement privilege does apply, it should
8 be overcome by the needs of this case.

9 And, yeah, that's, you know, and I'll just kind
10 of quote the decision by the, in Floyd where, you know,
11 the court said that an important factor is whether the
12 case is a civil rights case and it's certainly a matter
13 here that, it certainly matters here how the NYPD
14 conducted its intelligence gathering.

15 THE COURT: Mr. Scutero.

16 MR. SCUTERO: (no response)

17 THE COURT: Mr. Scutero, anything you want to
18 add to this?

19 MR. SCUTERO: No, Judge.

20 THE COURT: I mean what is the City's plan in
21 terms of testimony or defense it's going to offer saying
22 we did X because intelligence told us that, you know, Y
23 was going to happen?

24 MR. SCUTERO: Well, that is, Judge, that is,
25 you know, information that the City would rely upon.

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THE COURT: Well, I mean is it information in any of the documents we're talking about?

MR. SCUTERO: Well, that's what I was - that's what I was arguing before that there doesn't appear to be information in this document that relates to the protests. I'd have to --

THE COURT: Yeah, I agree as to this document, but I guess maybe I'm reopening my thinking as to other documents. I agree, this document - I'm not even sure why it was considered relevant except that it summarizes I guess how the intelligence bureau works, maybe that's viewed as having some relevance. I don't think it's really very, I don't think, you know, what units they operate under and how those units operate are sufficient relevance to overcome the privilege. But I'm just now going back, you know, to some of the other documents that had some specific intelligence. I mean obviously the City is not going to be able to use those documents in any way. I assume that's understood at a minimum.

MR. SCUTERO: Yeah, that's - yes. And the City was not planning on using those documents, Judge, since they don't --

THE COURT: So what are they going to use --

MR. SCUTERO: -- no relevance --

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2 THE COURT: What are they going to use to talk
3 about the threats? Are they just going to rely on
4 testimony and what is the testimony based on?

5 MR. SCUTERO: Well, Judge, I don't, I can't say
6 for sure offhand. The City will be relying on
7 testimony, and that will be subject of, you know,
8 depositions that plaintiffs are currently taking. But I
9 can't say for sure which documents the, that - without
10 seeing them in front of me, which documents the City
11 will be relying upon with respect to intelligence. I
12 can --

13 THE COURT: But it's not these documents
14 obviously.

15 MR. SCUTERO: Right, that's what I was going to
16 say, Judge, it's not these documents.

17 THE COURT: But what intelligence documents,
18 are there intelligence documents that don't reveal
19 techniques and (indiscernible)?

20 MR. SCUTERO: Well, I believe there would be.
21 I can't say for sure, Judge, but, generally speaking, I
22 would say that, yes, there are documents, there are
23 intelligence documents that could be produced or have
24 already been produced --

25 THE COURT: Well, I hope they have been

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produced --

(interposing)

MR. SCUTERO: Yes, sorry, Judge, I misspoke.

That have been produced that do not reveal techniques and procedures. It's hard to say --

MR. LAMBRIGHT: Your Honor --

THE COURT: It's hard to say, you know, with the documents in front of me, without knowing all the documents in the universe of documents that have been produced, whether or not, you know, there are documents that the City will be relying upon with respect to intelligence. I can't say that for sure because I don't have, I don't know the whole universe of documents. There's been so many that have been produced already.

THE COURT: Mr. Lambright, you were saying something?

MR. LAMBRIGHT: Yes, Your Honor, you know, I just want to flag that we do have a preclusion argument and that, you know, even if the City's not going to rely upon these specific documents to make its intelligence argument, we need to be able to review, you know, it's unfair for us not to have reviewed these documents and to challenge, asserting that there were threats against officer safety and other intelligence related matters

1 and not to be able to use these in our preparation for
2 depositions and those (indiscernible) challenge
3 assertions that are kind of made about threats to
4 officers' safety and terrorism threats. You know,
5 obviously there are going to be a lot of assertions
6 about whether there was actual threats or not, and to be
7 able to review these documents is kind of essential for
8 us to be able to say that, you know, one possible threat
9 was not really credible and to really kind of go and
10 say, and make our claim and case that the NYPD was
11 relying upon faulty intelligence to over-police these
12 protests and to escalate tension resulting in harms to
13 our clients.

15 MR. SCUTERO: Well, Judge, what I would say is
16 that, again, we would not be relying on the documents
17 that are subject to privilege in this case and that
18 plaintiffs' argument would essentially eviscerate the
19 privilege if they're saying that because they're making
20 an argument based on intelligence that then they can,
21 they should be permitted to view documents relating to
22 intelligence, that would just completely eviscerate the
23 privilege. We would not have the ability to assert
24 privilege at that point. And documents that ordinarily
25 would be protected would be subject to being disclosed.

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2 So I think it's a broad view of this sword and
3 shield argument that plaintiffs appear to be taking when
4 that sword and shield's argument is more narrowly
5 tailored than I think plaintiffs seem to be suggesting.

6 THE COURT: Well, In re City of New York is a
7 little equivocal on this. It seemed to be satisfied
8 with a notion that the (indiscernible) used as a sword,
9 though it did find in the alternative that even if it
10 was selectively disclosing reports that they found that
11 there was other information available through the other
12 reports, which they called the end user reports.

13 You know, looking at these documents, you know,
14 the undercover is much more specific than some of the
15 other ones. The other ones are really just not going to
16 be useful to the plaintiffs. So it's easy for me to
17 find that they certainly couldn't form the basis for
18 preclusion.

19 I think the way we're going to have to leave
20 this is if in questioning anyone about the basis for
21 their, you know, policing activities, if they're relying
22 on some intelligence reports and it's determined that,
23 in fact, the plaintiffs weren't provided with whatever
24 that information was, I think that would be the time to
25 come immediately back to me and see if at that point

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there's a basis for getting (indiscernible) preclusion or something else. So it's not the most efficient way to do it, but I don't really see any other way to do it.

So I'm going to adhere to my rulings on the law enforcement privilege, and if something comes up in the future depositions that suggests there's an unfairness, I'm ready to hear it.

All right, let's move on to deliberative process. And let me, I believe the first - let me just clear out what I have. Okay, we're going to go back to the NYPD documents, and I think the first one ends 34920. Mr. Scutero, do you see the document I'm talking about?

MR. SCUTERO: Yes, Judge, I'm pulling it up now.

THE COURT: Just give me a second to --

MR. SCUTERO: Yes, Judge, I have it.

THE COURT: Okay, so we're - so let me hear what you have to say about this.

MR. SCUTERO: Sure, Judge. It's - as you know, for a document to be privileged under the deliberative process, it has to be pre-decisional and deliberative. In this email exchange, you can clearly see that members of the police department are suggesting and debating

C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the United States District Court, Southern District of New York, In Re: New York Policing During Summer 2020 Demonstrations, docket #20cv8924, was prepared using PC-based transcription software and is a true and accurate record of the proceedings.

Signature Carole Ludwig

Date: February 14, 2023